Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
October Term, 1978
No. 78-939

FRANK PALMIERI,
Petitioner,

-against-

EUGENE LeFEVRE, Superintendent Clinton Correctional Facility,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

FRANK PALMIERI,

Appellant,

-against-

EUGENE LeFEVRE, Superintendent
Clinton Correctional Facility,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Frank Palmieri, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on September 20, 1978.

OPINION BELOW

The United States Court of Appeals for the Second Circuit affirmed, without a written opinion, the denial of petitioners application for a writ of habeas corpus by Hon. Eugene H. Nickerson on April 4, 1978 (See, Appendix, *infra,* for the order of the Court of Appeals and the opinion of Judge Nickerson).

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Second Circuit was entered on September 20, 1978. The jurisdic-

tion of the Court is invoked under 28 U.S.C. Sec. 1254 Sub. 1. The petition for a writ of certiorari was filed within 90 days of the date of the order of the Second Circuit.

QUESTION PRESENTED

Whether petitioner, an indigent, was deprived of equal protection and due process under the Fourteenth Amendment to the United States Constitution by the failure of the State to provide him with a free transcript of the separate trial of his co-defendant?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the due process clause under the Fifth and Fourteenth Amendments, the right to counsel under the Sixth and Fourteenth Amendments, and the equal protection clause of the Fourteenth Amendment. The pertinent text of each is set forth in the Appendix, *infra.*

STATEMENT OF FACTS

Petitioner and Michael Blake were indicted for the crime of murder; the indictment alleged that on or about January 30, 1968, in Queens County, they caused the death of May Lang while robbing her. On March 18, 1969, following a *Huntley* hearing before the Honorable Albert H. Bosch, Palmieri's application to have his trial severed from that of Blake was granted (Vol. II, 594a).* Blake's trial followed the *Huntley* hearing. Petitioner's attorney, immediately prior to Blake's trial, requested that the court

* Volumes and numbers refer to the pages of the transcript of Palmieri's trial.

provide petitioner, who was indigent, a transcript of Blake's trial. Counsel maintained that he needed the transcript in order to prepare the defense (Vol. II, 595a). The court denied the application but invited counsel to reapply, on written papers, before another judge (Vol. II, 595a-597a). On March 24, 1969, during Blake's trial, counsel made such a motion before the Honorable J. Irwin Shapiro, sitting in the motion part of Queens County Supreme Court. That motion was granted only to the extent that the People were ordered to provide petitioner with Blake's transcript only if they ordered a copy for themselves (See, Appendix *infra*). Petitioner was never provided with that transcript.* Blake was found guilty of murder.**

Petitioner, on May 19, 1969, proceeded to trial before the Honorable Paul Balsam. Although petitioner was represented by different counsel than Blake had been, the same assistant district attorney prosecuted both cases (Vol. VIII, 1291). Petitioner was found guilty of murder and was sentenced to a period of life imprisonment with a minimum of twenty-five years.

In the Appellate Division, Second Department, petitioner urged reversal of his conviction. The appellate Division affirmed without opinion*** and leave was denied by the Court of Appeals.****

Petitioner, in a *pro se* petition for a writ of habeas

* This is evidenced by the fact that petitioner, after his trial, again moved for the State to provide him with Blake's transcript; that application, too, was denied. (See appendix *infra*).

** On August 20, 1969, Blake was sentenced to life imprisonment with a minimum of fifteen years. His conviction was subsequently reversed. 44 A.D. 2d 606 (2d Dept. 1974).

*** 44 A.D. 2d 654 (2d Dept. 1974).

**** April 5, 1974, Stevens, J.

corpus in the United States District Court for the Eastern District of New York, raised the same issues presented in the state courts. In response to petitioner's claim that he was unconstitutionally deprived of a transcript of Blake's trial, Judge Nickerson held:

> Petitioner's third argument is that he, as an indigent, was entitled to a free transcript of the separate trial of his codefendant, as an aid to the preparation of his own case. While the Supreme Court has held that an indigent defendant is entitled to free transcripts of preliminary hearings for trial purposes, *Roberts v. LaVallee,* 389 U.S. 40, 42; 88 S. Ct. 194, 196 (1967), and to free transcripts of trial proceedings for appeal purposes, *Griffin v. Illinois,* 351 U.S. 12, 76 S. Ct. 585 (1956), petitioner cites no case extending this equal protection rationale to the point of entitling an indigent to a free transcript of a co-defendant's trial merely on the theory this may be of some aid to him or his counsel. I do not believe that the state is constitutionally required to provide at its own expense every imaginable aid to the preparation of an indigent defendant's case. *Cf. United States v. MacCollom,* 426 U.S. 317, 96 S. Ct. 2086 (1976).

Judge Nickerson denied Palmieri's petition without a hearing.

REASONS FOR GRANTING THE WRIT

THE WRIT SHOULD BE GRANTED TO RESOLVE WHETHER AN INDIGENT ACCUSED'S RIGHT TO MINUTES OF ALL PRIOR PROCEEDINGS IN HIS CASE EXTENDS TO MINUTES OF THE TRIAL OF A CODEFENDANT WHERE THE EVIDENCE AGAINST BOTH WAS VIRTUALLY THE SAME.

Petitioner and Blake stood accused of acting in concert in committing the robbery and murder of May Lang. Blake's case was severed and his trial proceeded first. Petitioner, indigent and unable to purchase a transcript of Blake's trial, applied on more than one occasion for the State to provide him with that transcript; his applications were denied. Where the only obstacle petitioner faced in obtaining minutes that were necessary in defending himself against a murder charge was his indigency, the denial of his requests for Blake's transcripts was in violation of his Fourteenth Amendment rights to equal protection and due process and mandates a new trial.*

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* The only reported case found in which this equal protection issue was raised is *United States v. Bamberger,* 482 F. 2d 166 (9th Cir.) cert. denied 414 U.S. 1041 (1973). There the codefendant was tried twice; the first trial resulting in a hung jury. The defendant already had a copy of the transcript of the codefendant's first trial and the court never reached the issue of whether he was entitled to a transcript of the second trial, holding that "any error in its denial was harmless beyond a reasonable doubt." 482 F. 2d at 168. Such clearly is not the case here. Further, petitioner contends, in agreement with the 7th Circuit's ruling in *United States v. Jonas,* 540 F. 2d 566 (7th Cir. 1976), reversing a conviction due to the denial of a free transcript of a prior mistrial, that harmless error analysis is in-

It has long been the law that rich and poor alike must be judged equally when "stand(ing) . . . before the bar of justice . . ." *Chambers v. Florida,* 309 U.S. 227, 241 (1940); *Griffin v. Illinois,* 351 U.S. 12, 17 (1956). "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin, supra.* at 17.

In recognition of this, courts in the past two decades have afforded the poor the necessary tools for preparation of a defense at no cost to them.* As Mr. Justice Black noted in *Griffin,* holding that equal protection and due process required that all defendants have similar access to appellate revie regardless of wealth,

> There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance.

351 U.S. at 18. See also, *Roberts v. LaValee,* 389 U.S. 40, 42 (1967).

In accord with this principle the Supreme Court held, in *Britt, v. North Carolina,* 404 U.S. 226 (1971), that an indigent defendant was entitled to a transcript of his prior trial, for the same crime, which had resulted in a hung jury.**

---

appropriate in this case as the error is of constitutional magnitude and, even if inconsistencies in testimony appear minor, the harm to appellant might be substantial. See, 540 F.2d at 572-573.

* E.g., *Britt v. North Carolina,* 404 U.S. 226 (1971) and other cases cited notes 1-3, at 231 (Douglas J., dissenting). *See generally, Discrimination Against the Poor and the Fourteenth Amendment,* 81 Harv. L. Rev. 435, 435-436 (1967).

**Despite this holding the Court found that *Britt,* under that narrow circumstances of that case, had an adequate alternative available to his transcript. This is not the case here.

> *Griffin v. Illinois,* and its progeny established the principle that the State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners. While the outer limits of that principle are not clear, there can be no doubt that the State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal.

404 U.S. at 227.

The Court set forth two guidelines in determining the right of an indigent defendant to a free transcript. The first is the value of the transcript and the second the availability of alternatives to the transcript. It is clear that in the instant case no alternative to the transcript was available to Palmieri.

As to the first criterion, suffice it to say that a transcript of an alleged accomplice's prior trial is as valuable to a defendant as the transcript of his own prior trial.* The majority in *Britt,* referring to the dissent by Justice Douglas, indicated two ways in which a transcript of a previous trial would be helpful. One, as a discovery device in preparation for trial,** the second as a tool at trial for the impeachment of prosecution witnesses.*** Justice Douglas, at great length, described ways in which a prior trial would be useful to the defense. 404 U.S. 233-41. He

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* Possibly even more valuable, since a defendant and counsel would be present at the defendant's own prior trial.

**Both the Assistant Attorney General in his affidavit in opposition to Palmieri's *pro se* habeas corpus application and the Assistant District Attorney in his brief to the Appellate Division, urged rejection of petitioner's claim to Blake's transcript for this very reason; that it was tantamount to a discovery motion that if made would have been denied.

***404 U.S. at 228.

particularly focused on the importance of such a transcript given the limited discovery rules in State criminal prosecutions.

Here, had Palmieri the funds, he could have simply purchased the transcript of Blake's trial and used that as a discovery and impeachment device. As long as petitioner could have purchased this obviously helpful information, his poverty cannot constitutionally be a bar to his obtaining such a valuable aid in trial preparation.

> A mistrial transcript contains not only prosecution witnesses' names and addresses but their stories under oath and it contains the entire theory of the government's case. Such a document is a complete dossier of the opposing case for which even the most liberalized rules of civil discovery have no equivalent . . . the State may not condition its availability upon financial consideration which effectively deprive the poor of this valuable tool.

404 U.S. at 246 (Douglas, J., dissenting). *Cf., United States ex. rel. Wilson v. McMann,* 408 F. 2d 896, 897 (2d Cir. 1969) (indigent defendant has right to transcript of previous trial resulting in hung jury).

It is unnecessary to examine specifically how counsel may have utilized the earlier transcript for trial purposes. "Our cases have consistently recognized the value to a defendant of a transcript of prior proceedings, without requiring a showing of need tailored to the facts of the particular case." *Britt v. United States, supra.* at 228.* In most cases, there is no difference between the value of a

*New York courts have consistently held that given a timely request for minutes of a prior proceeding, the use to which they may be put is irrelevant. *People v. Zabrocky,* 26 N.Y. 2d 530, 536 (1970). Accord, *People v. Sanders,* 31 N.Y. 2d 463, 466 (1973); *People v. Peacock,* 31 N.Y. 2d 907, 908 (1972); *People v. West,* 29 N.Y. 2d 728, 729 (1971).

transcript of a defendant's own mistrial and that of a previously tried accomplice.

The rule of *Britt* is not based upon some property right, but rather is based upon the obvious need for these minutes. The need of an accused for the minutes of a co-defendant's trial may not always be as great as the need for the minutes of his own prior proceedings, but where, as here, the evidence against the two is almost identical, then the distinction between the two situations is without meaning. Palmieri's need for and potential use of the minutes of Blake's trial was identical to *Britt's* need and potential use of the minutes of his prior trial. To distinguish Palmieri's situation from Britt's is to disregard the reasoning behind *Britt.* Here, many of the same witnesses who testified in Blake's trial, also testified at Palmieri's trial and for both discovery and impeachment purposes, counsel to a wealthy defendant would have been remiss in not purchasing Blake's transcript.* The importance of the transcript of Blake's trial to Palmieri is made obvious by the fact that Blake's attorney did not represent Palmieri while the same assistant district attorney prosecuted both cases. Mr. Justice Shapiro's unusual decision granting Palmieri's application for the transcript of Blake's trial only if the State ordered its own transcript, gave the State the opportunity to deprive petitioner of the transcript without causing the prosecutor any great inconvenience, he being privy to the evidence against Palmieri and having prosecuted Blake, thus presumably having trial notes and knowledge of what the witnesses said. Such a result is patently unfair and is solely the result of petitioner's indigency. Thus, the transcript of Blake's

* A comparison of the Appellate Division's brief in Blake's case and the transcript here, indicates that among the most important common witnesses were many of the police officers, including the officers at the scene and the investigating detectives.

trial is necessary to vindicate Palmieri's legal rights. See, *United States ex. rel. Wilson v. McMann, supra.*

In addition to being violative of petitioner's guarantees of due process of law and equal protection under the law (U.S. Const. Amends. V and XIV), the court's denial of the transcript of Blake's trial deprived Palmieri of his right to counsel. U.S. Const. Amend. VI. *Gideon v. Wainwright,** and its progeny guarantee to indigent defendants not only "paper" counsel but the effective assistance of counsel. *See, In Re Oliver,* 333 U.S. 257, 275 (1945). Aids, to counsel, such as minutes of prior proceedings, are part and parcel of the delivery of effective assistance of counsel. *Right to Aid in Addition to Counsel for Indigent Criminal Defendants,* 47 Minn. L. Rev. 1054 (1963). Here, the State, by denying appointed counsel the tools for Palmieri's defense, deprived him of his right to effective representation.

Although the Fourteenth Amendment was not meant to end all distinctions between rich and poor, it does require that "indigents have an adequate opportunity to present their claims fairly within the adversary system." *Ross v. Moffitt,* 417 U.S. 600, 612 (1974). Palmieri was not given that opportunity. Accordingly, this Court should order the State of New York to provide Palmieri a transcript of Blake's trial and to afford Palmieri a new trial.

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* 373 U.S. 335 (1963).

CONCLUSION

FOR THE FOREGOING REASONS, THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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APPENDIX "A"
AMENDMENTS V, VI AND XIV

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX "B"
USCA ORDER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of September one thousand nine hundred and seventy eight.

Present:

HON. LEONARD P. MOORE
HON. WILLIAM H. TIMBERS
HON. ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges,

FRANK PALMIERI,

Petitioner-Appellant,

v.

EUGENE LE FEVRE, Warden Clinton Correctional Facility,

Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of New York

This cause came on to be heard on the transcript of

record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the Court's oral opinion in open court with costs to be taxed against the appellants.

A. DANIEL FUSARO
Clerk
By: s/Arthur Heller
ARTHUR HELLER
Deputy Clerk

APPENDIX C—MEMORANDUM AND ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FRANK PALMIERI,

Plaintiff,

-against-

EUGENE LeFEVRE, Supt., Clinton Correctional Facility,

Respondent.

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77 C 1698

MEMORANDUM AND ORDER

NICKERSON, District Judge

On May 26, 1969, Frank Palmieri was convicted on two counts of murder after a jury trial in Queens County Supreme Court. He now petitions for a writ of habeas corpus, raising precisely the grounds raised on an unsuccessful direct appeal from the judgment of conviction.

Petitioner's first argument is that he was entitled to a new trial because of evidence discovered after the conclusion of the jury trial. This evidence was presented to Mr. Justice Balsam the trial judge, who held two hearings beginning respectively on November 13, 1969, and March 9, 1971, to determine whether the new evidence justified a new trial. By orders dated June 25, 1970 and June 28, 1971, Mr. Justice Balsam reviewed the testimony taken at the hearings and the affidavits submitted by the parties,

and held that a new trial was not warranted. [Record on Appeal, Vol. I., pp. 66a-69a; 91a-95a.] The basis for defendant's motions was the purported recantation of several crucial prosecution witnesses who had testified at trial that Palmieri had admitted committing the crime. However, one of the witnesses who was supposedly ready to recant testified at the second hearing that while in prison on an unrelated charge he had been forced by petitioner's friends to sign a statement saying that he had lied during petitioner's trial. This witness, Harvey Wohl, testified at the hearing that he had testified truthfully at the jury trial and that he would not have signed the purported recantation but fo the coercion. Mr. Justice Balsam found the evidence submitted by the defendant at the hearings not worthy of belief and denied the motions for a new trial.

The mere fact of recantation does not entitle a convicted defendant to a new trial: indeed, recantations are viewed "with the utmost suspicion." *Rice v. Vincent,* 491 F.2d 1326, 1332 (2d Cir.), *cert. denied* 419 U.S. 880 (1974). And the determination on the question of credibility made by Mr. Justice Balsam, who had the opportunity to observe the witnesses at both the trial and the post-trial hearings, should not be disturbed by me on this habeas corpus proceeding.

Petitioner's second argument is that the Assistant District Attorney failed to disclose that his chief witness, Harvey Wohl, was testifying at petitioner's trial as part of a deal worked out between Wohl, Assistant District Attorneys Lombardino and/or Maiolo, and Mr. Justice Thompson with respect to a robbery charge brought against Wohl. Petitioner seems to be arguing that Wohl received an "extremely light" sentence from Mr. Justice Thompson on the burglary charge, and that part of the deal that led to this sentence was a promise by Wohl to

identify petitioner as one of the perpetrators of the murder. However, Mr. Justice Thompson, Assistant District Attorneys Lombardino and Maiolo, and Wohl all testified that no agreement had been reached or even discussed regarding Wohl's testimony in petitioner's case. [Record, Vol. VI, p. 375; Vol. VIII, p. 1336; Vol. V, p. 275; and Vol. III, p. 980a.] Apparently in the course of discussing Wohl's own robbery case with Mr. Justice Thompson and the Assistant District Attorney, Wohl volunteered the information regarding petitioner but, unless all four witnesses are to be disbelieved, this did not form a part of the agreement. As there was no agreement concerning Wohl's testimony at petitioner's trial, there was nothing for the prosecution to disclose.

If Wohl was testifying because of a hope of currying favor with the state authorities rather than out of a sense of civic duty, this was a matter to be brought out on cross-examination of Wohl, and petitioner's trial counsel did in fact try to place this interpretation of Wohl's motives before the jury on cross-examination. [Record, Vol. III, pp. 980a, etc.]

Petitioner's third argument is that he, as an indigent, was entitled to a free transcript of the separate trial of his codefendant, as an aid to the preparation of his own case. While the Supreme Court has held that an indigent defendant is entitled to free transcripts of preliminary hearings for trial purposes, *Roberts v. LaVallee,* 389 U.S. 40, 42; 88 S.Ct. 194, 196 (1967), and to free transcripts of trial proceedings for appeal purposes, *Griffin v. Illinois,* 351 U.S. 12, 76 S.Ct. 585 (1956), petitioner cites no case extending this equal protection rationale to the point of entitling an indigent to a free transcript of a co-defendant's trial merely on the theory this may be of some aid to him or his counsel. I do not believe that the state is constitutionally required to provide at its own expense every imaginable

aid to the preparation of an indigent defendant's case. *Cf. United States v. MacCollom*, 426 U.S. 317, 96 S.Ct. 2086 (1976).

Finally, petitioner argues that when the witness Avalos testified that the defendant's nickname was "Animal" this so prejudiced the jury against the defendant that he was denied a fair trial. I note that Mr. Justice Balsam instructed the jury not to draw any inference from this nickname, [Record, Vol. IV, p. 1223a] and I reject this claimed constitutional error as wholly spurious.

The petition is denied. So ordered.

Dated: Brooklyn, New York
April 4, 1978

s/ Eugene H. Nickerson
Eugene H. Nickerson, U.S.D.J.

The Clerk shall make copies of this Memorandum and Order and serve them upon the parties.

APPENDIX D—JUDGMENT OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FRANK PALMIERI,

Plaintiff,

-against-

EUGENE LeFEVRE, Supt. Clinton Correctional Facility,

Respondent.

JUDGMENT 77 C 1698

A memorandum and order of Honorable Eugene H. Nickerson, United States District Judge, having been filed on April 5, 1978, denying the petition for a writ of habeas corpus, it is

ORDERED and ADJUDGED that the petitioner take nothing of the respondent, and that the petition for a writ of habeas corpus is denied.

Dated: Brooklyn, New York
April 7, 1978

s/ Richard H. Weur
Clerk

FILED IN CLERK'S OFFICE U.S. DISTRICT COURT
E.D.N.Y. APR 7-1978

APPENDIX E—ORDERS OF THE STATE COURT

At a Criminal Term, Part I, of the Supreme Court, held in and for the County of Queens, at the Courthouse 125-01 Queens Boulevard, Kew Gardens, New York, on the 24th day of March 1969.

PRESENT: Hon. J. IRWIN SHAPIRO, Justice.

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

FRANK PALMIERI,

Defendant.

Ind. No. 920-68

Motion (1) to furnish transcript minutes of trial of Michael Blake; (2) daily copy

Submitted March 24, 1969

Michael Ruggiero, for the Motion

L. Gresser, A.D.A., Opposed

The following papers numbered 1 to 2 submitted in this motion

	Papers Numbered
Notice of Motion and Affidavits Annexed	1-2

***

Upon the foregoing papers, and for the reasons stated on the record, this motion will be granted and the District Attorney will provide transcript to defendant only if the District Attorney orders copies for himself.

s/ J. Irwin Shapiro
J.S.C.

GRANTED:
Date: March 24, 1969

s/ Paul Livoti

At a Criminal Term, Part I, of the Supreme Court, held in and for the County of Queens, at the Courthouse, 125-01 Queens Boulevard, Kew Gardens, New York, on the 9 day of September 1969.

PRESENT: Hon. EDWARD THOMPSON, Justice.

THE PEOPLE OF THE STATE OF NEW YORK

-against-

FRANK PALMIERI,
MICHAEL BLAKE,

Defendants.

Ind. No. 920-68
Motion for transcript of minutes
Submitted August 11, 1968
Michael Ruggiero, for the motion
Thomas J. Mackell, D.A. Opposed

The following papers numbered 1 to 2 submitted in this motion

	Papers Numbered
Notice of Motion and Affidavits Annexed	1-2

***

Upon the foregoing papers, and the opinion of the Court herein, the motion on behalf of the defendant FRANK PALMIERI is in all respects denied.

s/ E. Thompson
J.S.C.

GRANTED: Date: September 9, 1969
s/ Paul Livoti

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART I

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

FRANK PALMIERI,
MICHAEL BLAKE,

Defendants.

By THOMPSON, J.
DATED September 9, 1969
Ind. No. 920-68

Defendant Frank Palmieri indicted with one, Michael Blake, for the crime of murder, on his motion made March 17, 1969 was granted severance. After trial by jury, a verdict of guilty of manslaughter under the first count of the indictment was found against codefendant Blake on March 28, 1969. Defendant Palmieri on May 26, 1969, after a jury trial, was found guilty of murder under both counts of the indictment.

Defendant Palmieri here seeks a transcript of the entire trial of his codefendant Blake, uring that he cannot obtain them because of his indigence and that he requires them for the protection of his constitutional rights.

Defendant relies on *People v. Montgomery* (18 N Y 2d 993) in which the court reversed defendant's conviction and remitted the case to the trial court for new trial on the ground that an indigent defendant is entitled to the minutes of a preliminary hearing. The court referring to the Code of Criminal Procedure, section 206, said at page 994:

> "There is no doubt that section 206 affords one who is capable of paying for it an absolute right to a transcript of

> the preliminary hearing. Thus, the State cannot, consonant with the equal protection clause of the State and Federal Constitutions, deny a defendant, prior to trial, access to a transcript of a preliminary hearing because of his inability to pay (cf. *People v. Jaglom,* 17 N Y 2d 162, 165). We hold, therefore, that when a defendant requests a transcript and when that request is accompanied by an affidavit of indigency, the State must honor that request."

Clearly the relief sought herein can under no view of the facts be regarded as coming within the purview of *Montgomery, supra.* In *Montgomery,* the *defendant* was denied a copy of the minutes of a preliminary hearing which were necessary and pertinent to his defense while the same minutes by statute would have been available to him as a defendant if he was able to pay for them. Here, defendant Palmieri seeks not the minues of his own trial, which were given to him at his request, but instead the minutes of the trial of his codefendant which, as noted above, was held separately at the special insistence and request of the defendant.

The defendant's contentions are not supported by any statute nor any decision which would entitle him to minutes of a trial in which he was not a participant. Of a certainty this request may be placed before any appellate tribunal for its determination.

Accordingly, the motion is denied.

Order entered herein.

The clerk of the court is directed to send a copy of the decision and order to the attorney for the defendant Palmieri.

s/ E. Thompson
J.S.C.

Supreme Court, U. S.
FILED
JAN 15 1979
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-939

FRANK PALMIERI,

Petitioner,

against

EUGENE LEFEVRE, Superintendent, Clinton Correctional Facility,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-939

FRANK PALMIERI,

Petitioner,

against

EUGENE LEFEVRE, Superintendent, Clinton Correctional Facility,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR RESPONDENT IN OPPOSITION

Questions Presented

1. Whether review should be denied of petitioner's Sixth Amendment claim for failure to exhaust State remedies?

2. Whether review should be denied of petitioner's due process and equal protection claims under the

Fifth Amendment for failure to exhaust State remedies and because the petition involves a State criminal proceeding?

3. Whether review should be denied because petitioner waived any right he might have to the transcript of his co-defendant's trial?

4. Whether review should be denied because under this Court's prior decisions, petitioner has not made out a substantial claim for a free transcript of his co-defendant's trial?

5. Whether review should be denied because the claims raised have uniformly been rejected by the State and Federal courts and this case was, in any event, correctly decided on the facts?

Statement of Facts

Respondent accepts the statement of facts of petitioner with the following reservations:

1. Immediately after the court granted petitioner Palmieri's motion to have his trial severed from that of his co-defendant, Michael Blake (1a: Vol. II, 594a-595a),* his counsel made an oral motion "for daily copy of the co-defendant's trial". (1a: Vol. II, 595a). Counsel argued that since he was retained under N.Y. County Law art. 18-b to

* For the convenience of the Court, respondent includes in Appendix "A" those pages of the transcript cited by petitioner in his application for certiorari and by respondent in this opposition. The page numbers before the colon refer to the pages of the Appendix. The volume and page numbers after the colon refer to the pages of the record on appeal of the criminal proceedings against petitioner Palmieri. The record on appeal against his co-defendant Blake included this same document with the same pagination.

represent an indigent and would feel it necessary to attend the co-defendant's trial and bill the County, it would save taxpayer funds and be more convenient for counsel if the Court ordered the minutes to be provided. (2a: Vol. II, 595a).

The Court denied the motion, saying:

> "I don't think the People against Montgomery [18 N Y 2d 993 (1966)] goes that far as to permit the minutes of a trial of another defendant, particularly where that defendant is represented by counsel of his own choice." (2a: Vol. II, 595a-596a).

On denial of that motion, counsel sought "a copy of the transcript", apparently referring to a transcript of the minutes to be prepared after the trial. The Court again held that *People* v. *Montgomery, supra,* "does not apply in this situation". It noted, however, that both requests could be made in New York Supreme Court, Special Term, Part I (hereinafter Special Term), on written papers. (2a: Vol. II, 596a).

2. Petitioner's written March 24, 1969, motion in Special Term was apparently* for either a transcript of the minutes of the trial of Michael Blake, his co-defendant, or for daily copy. The branch of the motion seeking daily copy was denied. Petitioner never clearly presented to the State courts, or indeed to the Federal courts herein, the question of his alleged entitlement to daily copy. On the instant petition he does not assert that claim. The branch of petitioner's pre-trial motion seeking a transcript after his co-defendant's trial was, "for the reasons stated on the

* Searches for the motion papers by petitioner's former counsel, the Federal Defenders Service Unit, by the executor of his trial counsel's estate and by that executor's counsel, by his appeal counsel, by the District Attorney, and by the Attorney General were unsuccessful. The heading of Special Term's order indicates the motion had two branches.

record . . . granted . . . only if the District Attorney orders copies for himself".

3. Co-defendant Blake was found guilty on March 28, 1969. Petitioner Palmieri was tried May 19-26, 1969. There was thus sufficient time between the conclusion of the co-defendant's trial and the commencement of petitioner's for the transcript to be prepared and a motion made for it in Special Term.*

4. Petitioner Palmieri moved on written papers in Special Term on August 7, 1969, after his trial, for co-defendant Blake's trial transcript. In the affirmation accompanying the motion, counsel sought the transcript to review "the alleged admissions, statements and confessions of Michael Blake during his trial which implicated [Petitioner] Palmieri . . . in order to fully protect [his] constitution [sic] rights . . ."** (7a).

5. Special Term denied the motion on September 9, 1969, holding that:

> "Clearly the relief sought herein can under no view of the facts be regarded as coming within the purview of *Montgomery, supra.* In *Montgomery,* the *defendant* [emphasis in original] was denied a copy of the minutes of a preliminary hearing which were necessary and pertinent to his defense while the same minutes by statute would have been available to him as a defendant if he was able to pay for them. Here, defendant Palmieri seeks not the minutes of his own trial, which were given to him at his request, but instead seeks the minutes of the trial of his co-defendant which, as noted above, was held separately at the special instance and request of the defendant.
>
> "The defendant's contentions are not supported by any statute nor any decision which would entitle him to minutes of a trial in which he was not a participant. Of a certainty this request may be placed before any appellate tribunal for its termination."

* The trial transcript of co-defendant Blake was submitted to the United States Court of Appeals for the Second Circuit as part of the supplemental record on appeal.

** For the convenience of the Court, the notice of motion and affirmation of petitioner's counsel, Michael Ruggiero, dated August 7, 1969, is included in respondent's Appendix "B" herein.

6. There is no indication in the record of a separate appeal from Special Term's denial of this motion, although the issue was raised in the appeal of conviction.

POINT I

Petitioner has not exhausted State remedies as to his Sixth Amendment claim of denial of effective assistance of counsel.

Petitioner first raised a claim that denial of his co-defendant's transcript deprived him of effective assistance of counsel under the Sixth Amendment on his appeal to the United States Court of Appeals for the Second Circuit of the denial of his application for a writ of habeas corpus. Respondent argued then and reasserts now that this was a new claim as to which petitioner had not exhausted State remedies and of which, under *Picard* v. *Connor,* 404 U.S. 270, 278 (1971), he could not now seek Federal review. See Brief for Respondent LeFevre before the United States Court of Appeals for the Second Circuit (hereinafter "Brief for Respondent"), at 16 n. "*". Petitioner never controverted respondent's argument.

POINT II

Petitioner cannot assert an independent claim under the Fifth Amendment to denial of due process and equal protection in a State criminal proceeding; in any event, he failed to exhaust State remedies as to any such claim.

Respondent noted below, without controversion by petitioner, that petitioner's Fifth Amendment claim was unclear and had not been presented to the State courts or to the Federal District Court. Brief for Respondent, at 16 n. "*". To the extent that this claim, which is still unclear in petitioner's present papers, is independent of his Fourteenth Amendment claim, it cannot be raised as an objection to State criminal court proceedings. See *Palko* v. *Connecticut*, 302 U.S. 319, 324-5 (1937); *Francis* v. *Resweber*, 329 U.S. 459, 467-9 (1947) (FRANKFURTER, J., concurring).

POINT III

Review should be denied because petitioner waived any right he might have to the transcript of his co-defendant's trial.

As noted above, petitioner's counsel at the pre-trial hearings said, at the same time he moved for the co-defendant's trial transcript, that if it was denied, he would have to attend that trial at the County's expense. (2a: Vol. II, 595a). It appears however, that he did not do so. (7a). If he had, his "trial notes might well [have provided] an adequate substitute for a transcript. . . ." *Britt* v. *North Carolina*, 404 U.S. 226, 229 n. 4 (1971). At the least, his notes might have allowed him to allege actual prejudice (assuming, *arguendo*, that there had been any) from denial of the transcript. His failure to attend represented a deliberate waiver of an adequate substitute for a transcript.

Petitioner's failure to show good cause for that waiver or actual prejudice from it bars Federal habeas corpus relief. *Cf. Wainwright* v. *Sykes*, 433 U.S. 72, 87 (1977); *Estelle* v. *Williams*, 425 U.S. 501, 508 n. 3 (1976); *Britt* v. *North Carolina*, *supra*, 404 U.S. at 230.

POINT IV

Review should be denied because under previous decisions of this Court, petitioner has not made out a substantial claim.

The right of an indigent criminal defendant to a transcript of his own trial is grounded on the fact that the transcript is *needed* on appeal, *Griffin* v. *Illinois*, 351 U.S. 12, 16 (1956) (BLACK, J.), but see *id.*, 351 U.S. at 30-32 (HARLAN, J., dissenting), and denial of it, or a reasonable alternative, would *preclude* the defendant from receiving a fair trial or adequate appellate review, *id.*, 351 U.S. at 17, 19 (BLACK, J.); *id.*, 351 U.S. at 23 (FRANKFURTER, J., concurring).

This Court has refused, however, to find that indigent defendants have a right to every legal weapon that other defendants may be able to purchase. *United States* v. *MacCollum*, 426 U.S. 317, 328 (1976) (no right to free transcript on Federal post-conviction motion to vacate sentence); *Ross* v. *Moffitt*, 412 U.S. 600, 608-10 (1974) (no right to free appointed counsel in second, discretionary State appeal). The State is only required to assure an indigent defendant the opportunity to present his claims fairly. *United States* v. *MacCollum*, *supra*, 426 U.S. at 328; *Ross* v. *Moffitt*, *supra*, 417 U.S. at 616.

Absent some showing of need, there is no reason to assume that a defendant will be unfairly handicapped in his defense by denial of a co-defendant's transcript.

Assuming, *arguendo,* that such a need were shown, so long as an adequate alternative to that transcript is available, a defendant would have no constitutional right to it. See *Griffin* v. *Illinois, supra,* 351 U.S. at 20. In New York there are several such alternatives.*

Since petitioner's claim is clearly without merit under the prior decisions of this Court, review of the instant petition should be denied.

POINT V

Review should be denied since the claims the petition raises have uniformly been rejected by the State and Federal courts and since the case was correctly decided on the facts.

In addition to the New York State courts in petitioner's original criminal proceeding and the United States District Court in the instant habeas corpus application, the United States Court of Appeals for the Sixth Circuit and the Tennessee Supreme Court have held that there is no constitutional right to a free transcript of a co-defendant's trial. *Elliot* v. *Morford,* 557 F. 2d 1228, 1232 (6th Cir. 1977); *State* v. *Elliot,* 524 S.W. 2d 473, 476 (1975).

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* First, a defendant's counsel may attend the co-defendant's trial and take notes as "an adequate substitute for a transcript," *Britt* v. *North Carolina, supra,* 404 U.S. at 229 n. 4, as petitioner's trial counsel proposed to do. Second, he may obtain an order, as did petitioner's counsel herein, for a free copy of the transcript if one is prepared for the prosecution. Third, if the prosecutor is aware of discrepancies in the testimony of a witness between trials, it would be his duty to alert the trial court. Fourth, the defendant's counsel could ask the co-defendant's counsel if there had been any surprises at trial, such as testimony varying from that in pre-trial proceedings. If there were, he could use that as grounds for a motion for the transcript. If there were not, then he could rely on the transcript of his own pre-trial proceedings and use that to impeach inconsistent testimony.

Likewise, the United States Court of Appeals for the Ninth Circuit has questioned whether such a right exists, finding that it would be at the "outer limits" of the rights of indigent defendants if it did. *United States* v. *Bamberger,* 482 F. 2d 166, 168 (9th Cir.), cert. den. 414 U.S. 1041 (1973). Reviewing the case before it, that Court found that even if the right existed, the defendant had shown no actual prejudice from its denial. *Id.,* 482 F. 2d at 168-9.

In its oral opinion affirming the District Court's decision herein, the United States Court of Appeals for the Second Circuit noted that while the transcript of a co-defendant's trial might be of some value to a defendant, one could not assume it would be as valuable as the transcript of the defendant's own trial. Since the right to the latter was not absolute, an extension of that right to the transcript of a co-defendant's trial would have to be based on a strong showing of need. *Draper* v. *Washington,* 372 U.S. 487 (1963). No such showing had been made by petitioner Palmieri.

Since the State and Federal courts are agreed that the right asserted by petitioner does not exist and that even if it were assumed to exist, it would only be triggered by a strong showing of need (or in Federal habeas corpus review of a State proceeding, by a showing of actual prejudice from its denial), there is no need for this Court to grant review. Moreover, under the standards set in those cases, the decision herein was clearly correct on the facts.*

---

* As respondent noted below, petitioner had available to him the transcript of the pre-trial proceedings in his case prior to its severance, at his request, from his co-defendant. The fact that his counsel, who was concededly adequate, was not able to impeach adverse witnesses using petitioner's pre-trial transcript in no way suggests he would have done better using the co-defendant's trial transcript. Notably, the prosecution's witnesses were found credible by the trial judge and jury, and petitioner's were not. Petitioner's counsel herein has been unable to show how the co-defend-

(footnote continued on following page)

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
January 8, 1979

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondent

GEORGE D. ZUCKERMAN
Assistant Solicitor General

ROBERT J. SCHACK
Assistant Attorney General
of Counsel

(footnote continued from preceding page)

ant's transcript would have been of assistance. The transcripts of both petitioner's trial and his co-defendant's were submitted to the United States Court of Appeals for the Second Circuit in the appeal below by respondent with the assertion, uncontroverted by petitioner, that there were no true inconsistencies between the testimony of the witnesses common to both trials. The Second Circuit's finding that petitioner failed to show actual need for his co-defendants' transcript implicitly accepted respondent's argument. Moreover, the case against petitioner, both in terms of testimony and extrinsic evidence, the evidence of his consciousness of guilt through his post-conviction actions in coercion of one witness and suborning of perjury by another, is overwhelming, showing that even if there were error in denying petitioner the transcript, it was at most harmless constitutional error. See Brief for Respondent, at 14-18.

APPENDIX A

Extract from the Transcript of the Pre-Trial Proceedings against Michael Blake and Frank Palmieri, as printed in the Record on Appeal, *People* v. *Blake*, Vol. II, 594a-597a, and the Record on Appeal, *People* v. *Palmieri*, Vol. II, 594a-597a.

(594a) critically impaired. The use of said admissions against him does not offend due process. (Culombe v. Connecticut, 367 U.S. 568.)

I am convinced beyond a reasonable doubt, based upon the believable evidence, that the admissions of the defendant were voluntarily made and were not induced by fear or caused to be made by threats, violence, coercion or mistreatment of any kind, physical or mental, or by a combination of both, nor by deception, trickery or other improper influences, nor did the defendant suffer any violation of his constitutional rights.

Accordingly, I find that said admissions were voluntarily made by the defendant Blake, and his motion is in all respects denied, with an exception.

All right, I'll hear any other applications now.

Mr. Ruggiero: May I at this time in behalf of the Defendant Palmieri renew my motion previously made and held in abeyance pending the determination of this hearing for a separate trial.

Mr. Lombardino: People consent.

The Court: All right. Application of (595a) the Defendant Palmieri is granted and his trial is severed.

Mr. Ruggiero: Now, at this time, if your Honor please, in behalf of Defendant Palmieri, I—if your Honor desires that I make the application on affidavit I will do so—but I intend to ask the Court to furnish the Defendant daily copy of the codefendant's trial when it starts so that

we can be apprised of the record in order to properly prepare for the defense of Palmieri, for this reason: I was assigned under the Article 18-B of the County Law. This defendant is without funds. If I were to sit here, which I feel that I should if your Honor denies my application, sit here throughout the length of the trial it would cost the County fifteen dollars an hour while I am here. I'd much rather have the minutes, read them at home, and save the County an expense of my presence so that I can properly prepare for this defendant's trial, whenever it is commenced.

The Court: I don't think the People against Montgomery goes that far as to permit the minutes of a trial of another defendant, particularly where that defendant is represented by counsel of his (596a) own choice.

Mr. Ruggiero: If your Honor please, I feel that I would be entitled to get the minutes when they are made to prepare for the defense. No question I am entitled to that.

The Court: During his trial, of course.

Mr. Ruggiero: Not his trial. Not talking about daily copy now, your Honor. If your Honor says I am not entitled to daily copy under the decisions then I say this: that under the decisions I am entitled to get a copy of the transcript of Blake's trial so I can prepare Palmieri's trial.

The Court: The only way you can get that is to make your application in Part I. You can't get that from me because I say People against Montgomery does not apply in this situation.

Mr. Ruggiero: I wanted the record to show I am asking for daily copy of Blake's trial.

The Court: I say that if you want to make the application you make it in Part I on written papers.

(597a) Mr. Ruggiero: Then your Honor won't decide it

and leave it open so I can go to Part I?

The Court: I'll let you go to Part I.

Mr. Ruggiero: All right, sir.

The Court: I think that's the proper way to do it.

Court: Clerk: Defendant Palmieri is remanded.

Miss Harnes: If your Honor please, I would just like to make—

Mr. Lombardino: If your Honor please, now that the Defendant Palmieri is being remanded the People respectfully renew our request and application to have the Defendant Palmieri sent back to the Tombs in Manhattan.

The Court: Yes. The application is granted. Frank Palmieri is to be returned to the place from whence he came.

Miss Harnes: If your Honor please I'd just like to make a statement for the record, if I may. The defense objects to the trial of this case by Mr. Lombardino, as attorney for the People. He .....

APPENDIX B

Notice of Motion and Affirmation of Michael Ruggiero, dated August 7, 1969.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF QUEENS : CRIMINAL TERM

THE PEOPLE OF THE STATE OF NEW YORK

—against—

FRANK PALMIERI and MICHAEL BLAKE

Defendants.

SIR:

PLEASE TAKE NOTICE that upon the annexed affirmation of MICHAEL RUGGIERO, Esq., sworn to and affirmed on the 8th day of August, 1969, and upon a copy of the indictment herein, the undersigned will move this Court at Criminal Term, Part I, thereof to be held at Queens County Courthouse at 125-01 Queens Boulevard, Kew Gardens, in the Borough of Queens, City and State of New York, on the 20th day of August, 1969, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an Order for the following relief:

(1) That the defendant or his attorney be furnished with a transcript of the testimony and trial of the co-defendant Michael Blake,

and for such other and further relief as may be just and proper.

Appendix B.

Dated: Jackson Heights, N.Y.
August 7th, 1969.

Yours, etc.

/s/ MICHAEL RUGGIERO,
MICHAEL RUGGIERO, ESQ.
Attorney for dft. Frank Palmieri
81-42 Baxter Avenue
Jackson Heights, N.Y. 11373

To: HON. THOMAS J. MACKELL
District Attorney—Queens County
120-05 Hoover Avenue
Kew Gardens, N.Y.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF QUEENS : CRIMINAL TERM

THE PEOPLE OF THE STATE OF NEW YORK

—against—

FRANK PALMIERI and MICHAEL BLAKE

Defendants.

STATE OF NEW YORK }
COUNTY OF QUEENS } ss.:

I, MICHAEL RUGGIERO attorney and counsellor at law af-

Appendix B.

firm under penalty of perjury that the following statements are true:

Upon the annexed affirmation that your affiant is the attorney for the above named defendant who was charged together with one, Michael Blake with the crime of Murder In an indictment containing two counts.

That heretofore a motion in behalf of the defendant Frank Palmieri was made for a severance and which motion was held in abeyance until the determination by this court of its decision on the Huntley Type Hearing which was held before Hon. Albert H. Bosch, a Justice of this Court on March 10th, 11th, 12th, 13th, and 14th, 1969.

That on March 17th, 1969, the court rendered its decision that the admissions allegedly made by the defendant Michael Blake were voluntary and the motion to suppress the said statements was denied.

That your affiant having been appointed pursuant to Article 18-B, of the County Law attended and participated in the said hearing and at the time of the Court's decision the application of your affiant in behalf of the defendant Frank Palmieri for a separate trial was granted and his trial was severed. At that time your affiant made an application to the Court that the defendant or his attorney be furnished with daily copy of the co-defendant's trial in order that the rights of the defendant Frank Palmieri be fully protected. The application was made from the authorization of People vs Montgomery 18, N.Y. 2d, 993, which the Court stated that the application for the minutes of the trial of Michael Blake should be made by application on affidavits in Part I, of this Court. The Court indicated at that time at page 499, of the Huntley Hearing testimony, that the court was reluctant to grant the application because it did not come within The People vs. Montgomery ruling.

Thereafter your affiant received information that the co-defendant Michael Blake proceeded to trial and was convicted of Murder.

Appendix B.

From my investigation I have ascertained that testimony was adduced as to the alleged admissions, statements and confession of Michael Blake during his trial which implicated the defendant Frank Palmieri.

The defendant Frank Palmieri proceeded to trial before the Court and jury on May 19th, 1969, and on May 26th, 1969, the defendant was found guilty of Murder. At the time of the conviction of the defendant Frank Palmieri your affiant reserved the right to make motions with respect to the jury's verdict until the time of sentence. The defendant has not to this day been sentenced.

It is necessary in order to fully protect the constitution rights of the defendant Frank Palmieri that he or his attorney be furnished with a copy of the transcript and testimony of the trial of Michael Blake.

It is your affiant's contention that because of the denial by the Court to furnish him or his counsel with the minutes of the trial of Michael Blake the co-defendant, that the defendant Frank Palmieri had been denied equal protection of law, in that because of his indigence he had been unable to secure the said minutes. This is another ground upon which your affiant intends to move to vacate and set aside the verdict of the jury upon constitutional grounds stated herein.

That no previous application for the within relief has been made except as stated herein.

WHEREFORE, your affiant respectfully asks that an order be made directing that the defendant Michael Blake and his attorney be furnished with a transcript of the said minutes of the trial of the co-defendant, Michael Blake.

Dated: Jackson Heights, New York,
August 7th, 1969

Submitted and Affirmed

By: /s/ MICHAEL RUGGIERO
Michael Ruggiero